U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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H3 NOV 23 2004

FILE: [redacted] Office: PHOENIX DISTRICT OFFICE Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico. The applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record reflects that the applicant is the spouse of a U.S. citizen and has three U.S. citizen siblings. He seeks a waiver of inadmissibility in order to remain in the United States with his wife and adjust his status to that of a lawful permanent resident.

The district director notified the applicant of the need to file a waiver application on June 20, 2003, granting 12 weeks, or until September 12, 2003, to submit the application and other requested evidence, pursuant to 8 C.F.R. § 103.2(b)(8). This section of the regulations prescribes the 12-week period and provides that "[a]dditional time may not be granted." 8 C.F.R. § 103.2(b)(8). The applicant submitted the waiver application on September 22, 2003. The district director deemed that the application for adjustment of status was abandoned pursuant to regulations that provide, in pertinent part:

> *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

8 C.F.R. § 103.2(b)(13). Accordingly, the district director denied the application for adjustment of status for abandonment due to failure to timely submit the waiver application and failure to submit an adequate affidavit of support. *Decision of the District Director on Form I-485* (October 21, 2003). The district director denied the waiver application on the same date. The district director found that the underlying adjustment application had been abandoned and denied and the waiver application was therefore no longer properly before the district director as provided in 8 C.F.R. § 212.7(a)(ii). Regulations governing applications before CIS further provide:

> *Effect of withdrawal or denial due to abandonment.* . . . A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen under § 103.5.

The district director nevertheless reviewed and adjudicated the waiver application on its merits, finding that the applicant failed to establish extreme hardship to his U.S. citizen spouse. *Decision of the District Director on Form I-601* (October 21, 2003).

On appeal, counsel contends that the waiver application was filed timely and establishes extreme hardship would result to the applicant's U.S. citizen spouse if the applicant were refused admission. Counsel further contends that the applicant is not inadmissible. The AAO notes that, although counsel indicated that a brief and/or evidence would be submitted within 30 days of filing the appeal, as of this date, over one year later, the record does not contain any additional materials. Therefore, the record is considered complete, and the AAO shall render a decision based upon the evidence before it at the present time. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.—
>
> > (i) In general.—Any alien (other than an alien lawfully admitted for permanent residence) who—
> >
> > . . .
> >
> > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
> >
> > . . .
> >
> > (v) Waiver.—The Attorney General [now Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a U.S. citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B).

In the present application, the record indicates that the applicant was admitted to the United States as a visitor on September 24, 1988, authorized to remain until September 28, 1988. On October 19, 1988, the applicant applied for temporary residence as a Special Agricultural Worker (SAW), under Section 210 of the Act, which was denied on July 11, 1991. The appeal of that denial was dismissed by this office on October 21, 1998. On January 14, 2000, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) as the beneficiary of an approved relative petition filed by his U.S. citizen spouse. The attached Form G-325, *Biographic Information* (January 11, 2000), indicates that the applicant claimed to have resided in the United States since 1992. The applicant has been issued multiple Authorizations for Parole of an Alien into the United States (Forms I-512) and used the advance parole authorization to depart and reenter the United States on multiple occasions. The record reflects that he last entered on or about January 7, 2002.

The accrual of unlawful presence for purposes of inadmissibility determinations under section 212(a)(9)(B)(i)(II) of the Act begins no earlier than the effective date of this amended section, April 1, 1997. The period of time during which a SAW application for lawful temporary residence is pending, including any period during which the denial of such application is pending appeal, has been designated as an period of stay authorized by the Attorney General for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum of* [redacted] *Executive Associate Commissioner, Office of Field Operations* (June 12, 2002). The proper filing of an affirmative application for

adjustment of status to that of a lawful permanent resident has also been designated as an authorized period of stay. *Id.*

The applicant accrued unlawful presence from October 21, 1998, when his appeal was dismissed until January 14, 2000, the date the Form I-485 was properly filed. In applying to adjust his status to that of lawful permanent resident (LPR), the applicant is seeking admission within 10 years of his 2001 or 2002 departure from the United States, or a period of over one year and two months. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Counsel's contention on the appeal form that CIS is "estopped" from finding the applicant inadmissible is without merit. Contrary to counsel's contentions, the applicant was not "admitted" to the United States when he entered pursuant to a grant of advance parole. Parolees, such as the applicant, are not admitted to the United States, but merely permitted to enter temporarily for humanitarian reasons without regard to admissibility. The authorizing statute specifically provides, "such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall . . . have been served . . . thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5). There is no evidence in the file that the applicant was admitted, as counsel contends. Even assuming he was admitted by immigration inspectors at a port-of-entry in connection with his travel as a flight attendant, there is no "estoppel" of CIS from making an independent admissibility determination. CIS is required to examine the applicant's admissibility based on the full picture of all available evidence before adjusting his status to that of a lawful permanent resident. INA § 245(a)(2); 8 U.S.C. § 1255(a)(2). The district director's determination of inadmissibility is therefore affirmed. The question remains whether he is entitled to a waiver of inadmissibility.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien herself is not a permissible consideration under the statute. The qualifying relative in this case is the applicant's wife.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of* [redacted] the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier

> of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also* [redacted] *INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

The record of hardship faced by the applicant's spouse below includes a statement of the emotional hardship that would result if the applicant is not admitted, and emphasizes the military service of the applicant's wife and the additional hardship caused by her frequent separation from him when she is on duty. She was deployed overseas at the time of her statement in support of the waiver, and projected that she would be back in the United States by early 2004. The record is not updated with her current deployment status. There is no additional evidence in the record addressing hardship. Financial documentation shows that the applicant provides approximately 61% of the $27,168 household income. The applicant and his wife apparently claim several dependents on their tax returns, including foster children, nephews, and the applicant's sister. The circumstances of these dependents are not addressed in the record, and therefore cannot be considered in the determination of whether the applicant's spouse faces extreme hardship.

The record contains insufficient evidence to support a finding that the applicant's spouse faces extreme hardship if the applicant is refused admission. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang,* 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship). While the Ninth Circuit places particular emphasis on consideration of the impact of separation of the family, the waiver is nevertheless not to be granted in every case where separation is at issue. The record does not contain evidence that the applicant's spouse would face a particular or uncommon hardship if the applicant were not admitted. Due to their present occupations, she and the

applicant already spend a great deal of time apart. In this case, the record does not contain sufficient evidence to show that the hardship faced by the qualifying relative rises beyond common difficulties of separation or relocation to the level of extreme.

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v).

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.